

DOCKET FILE COPY ORIGINAL

LAW OFFICES
HALEY, BADER & POTTS

4350 NORTH FAIRFAX DR., SUITE 900

ARLINGTON, VIRGINIA 22203-1633

TELEPHONE (703) 841-0808

FAX (703) 841-2345

POST OFFICE BOX 19008

WASHINGTON, D.C. 20036-9008

TELEPHONE

(202) 331-0808

RECEIVED

OCT 12 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

JOHN M. PELKEY
ADMITTED IN D.C. AND VA

October 12, 1993

OUR FILE NO.
1162-101-63

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

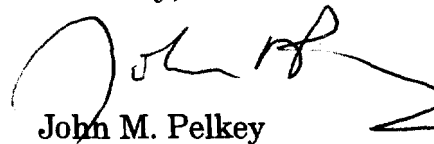
Re: Docket No. 93-158
RM No. 8239

Dear Mr. Caton:

Transmitted herewith on behalf of Donald B. Brady are an original and four copies of a Contingent Motion for Leave to be filed in the above-referenced proceeding.

If there are any questions concerning this submission, please contact this office directly.

Sincerely,


John M. Pelkey

JMP/lgs

Enclosures

No. of Copies rec'd
List ABCDE

CH 4

RECEIVED

Before The

Federal Communications Commission OCT 12 1993

Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter Of)

Amendment of Section 73.202)

FM Table of Assignments)

(Utica, Hazelhurst and Vicksburg,)

Mississippi))

Docket No. 93-158

RM-8239

TO: Chief, Policy and Rules Division

**CONTINGENT MOTION
FOR LEAVE**

On August 9, 1993, Donald B. Brady filed an expression of interest in the above-referenced proceeding. As is explained below, the expression of interest was timely filed. Reply Comments submitted in the proceeding, however, suggest that Mr. Brady's expression of interest was untimely. In the event that the Commission agrees that Mr. Brady's expression of interest was not timely filed, Mr. Brady, through counsel, requests that the Commission grant him leave *nunc pro tunc* to submit his expression of interest. In support of this motion, Mr. Brady states as follows:

I. Background

On June 16, 1993, the Commission issued a *Notice of Proposed Rulemaking and Order to Show Cause* ("NPRM") in the above-referenced proceeding. In that proceeding, the Commission proposed to substitute channel 265C3 for channel 225A at Utica, Mississippi. The Commission also proposed to substitute channel 225A for channel 265C3 at Hazelhurst, Mississippi, and to substitute channel 267A for channel 266A at Vicksburg, Mississippi. The

Commission noted, in accordance with Section 1.420(g) of the Commission's rules, that if a party other than the proponent of the channel changes expressed an interest in the C3 allotment at Utica, the modification could not be implemented unless an equivalent class channel were also allotted. The Commission provided for the filing of comments on or before August 9, 1993 and the submission of reply comments on or before August 24, 1993. Although the Commission acknowledged that interested parties could submit expressions of interest in the C3 allotment at Utica, it did not specify the date by which such expressions of interest were required to be filed.

On August 9, 1993, Mr. Brady facsimiled to the Commission a letter in which he expressed his interest in the C3 allocation at Utica, Mississippi. A copy of that submission, as retrieved from the Commission's files, is attached hereto as Attachment A. The header on the document indicates that it was facsimiled to the Commission at 1:46 p.m. on August 9, 1993 by Express Printing, a commercial printing company that provides facsimile services. Accompanying that expression of interest was a cover letter wherein Mr. Brady informed the Commission that the original copy of his expression of interest was being sent via courier. In point of fact, the original of the expression of interest was sent via "DASH." A copy of the DASH receipt is attached as Attachment B. DASH is a same day courier service provided by Delta Airlines, Inc. The DASH courier did not arrive at the Commission prior to the closing of the Commission's offices at 5:30. As a result, the original of Mr. Brady's expression of interest was not tendered to the Commission until August 10, 1993. To ensure that no confusion arose as to his interest in applying for the channel 265C3 allotment, Mr. Brady facsimiled yet another expression of interest to the Commission on August 24, 1993. Although neither of Mr. Brady's expressions of interest reflect the parties to whom copies were sent,

Mr. Brady, in fact, sent copies of both expressions of interest to Timothy K. Brady, Esq., the counsel for the Petitioner. Copies of the signed return receipts showing service of Mr. Brady's expressions of interest are attached hereto as Attachment C.

II. Mr. Brady's Expression of Interest was Timely.

Mr. Brady's expression of interest was timely filed. Neither the NPRM nor the rules that were attached to it set forth a date by which expressions of interest were required to be filed. Given the fact that the Petitioner was required to file comments, it is reasonable to assume that any other expressions of interest in the channel would be in the nature of "replies" to the comments filed by the Petitioner. View in that light, Mr. Brady's initial expression of interest was timely filed inasmuch as it was received by the Commission prior to the August 24, 1993 date for the submission of reply comments.

Moreover, even if the Commission were to interpret the NPRM as requiring the submission of expressions of interest by August 9, 1993, Mr. Brady's submission was still timely filed. The purpose of such a submission is to apprise the Commission whether it is necessary to allot an equivalent class channel. Certainly, by August 9, 1993, the Commission had been apprised of the fact that such an allotment was necessary inasmuch as, by that date, Mr. Brady had facsimiled his expression of interest to the Commission and informed the Commission that the original of the expression of interest was being couriered to it. From discussions with the Commission staff, Mr. Brady discovered that the expression of interest was actually received by the Commission staff on August 9, but was not physically transferred from the FCC's fax machine to the Secretary's Office until the following day. Thus, the

primary flaw with Mr. Brady's submission was that it did not include a sufficient number of copies. These copies were provided to the Commission on August 10 when the DASH courier was able to effectuate delivery.

III. Even if Mr. Brady's Expression of Interest is Viewed as Being Untimely, the Commission Nevertheless Should Grant Him Leave *Nunc Pro Tunc* to File it.

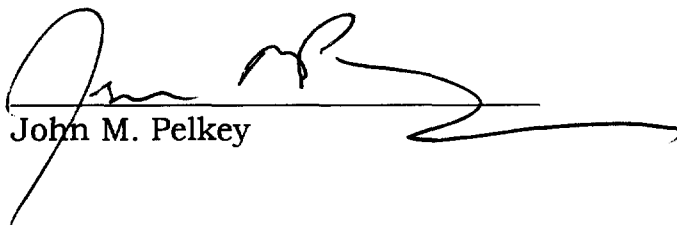
Mr. Brady is not a lawyer and no lawyer assisted him in the submission of his expression of interest. Although *pro se* parties cannot be permitted to trade on their ignorance of the fine points of Commission practice, in the present case, Mr. Brady did attempt to achieve substantial compliance with the Commission's rules. His expression of interest was actually received by the Commission on August 9. It was sent to counsel for the Petitioner, as the rules require. It included the Certification that the Commission's rules prescribe.¹ The fault with Mr. Brady's submission lies in its unorthodox method of delivery and the fact that the expression of interest, which was only seven lines long, did not state that it had been served upon counsel for the Petitioner.² Given the fact that the submission was actually served upon Petitioner, and given the fact that no delay has occurred in this proceeding because of Mr. Brady's failure to include a Certificate of Service, the Commission should not insist upon literal compliance with its rules, but should treat Mr. Brady's submission as a timely-filed expression of interest.

¹ Although the NPRM does not specify that parties submitting an expression of interest must state an intention to reimburse existing licensees who must change channels because of the proposed new allotment, Mr. Brady fully intends to reimburse those parties that would be so affected by adoption of the proposal.

² If the formality of a certification is required, Mr. Brady hereby certifies that copies of his expressions of interest were mailed to Timothy K. Brady, Esq.

Accordingly, Mr. Brady's expression of interest should be treated as timely filed or, alternatively, the Commission should grant Mr. Brady leave *nunc pro tunc* to file the expression of interest.

Respectfully submitted,



John M. Pelkey

HALEY, BADER & POTTS
Suite 900
4350 North Fairfax Drive
Arlington, VA 22203-1633
703/841-0606
October 12, 1993

ATTACHMENT A

DOCKET FILE COPY ORIGINAL

RECEIVED

AUG 10 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 9, 1993

Secretary
Federal Communications Commission
1915 M Street, N.W.
Washington, D.C. 20534

RE: MM Docket No. 93-158

Dear Sir:

Please find attached a copy of my comments in the above captioned proceeding. This document has been timely filed on 8/9/93. The original copy of the material is being sent via courier.

Sincerely,



Donald B. Brady
5980 Ridgewood Road
#D-40
Jackson, Mississippi 39211
601-684-5839

RECEIVED

DOCKET FILE COPY ORIGINAL

AUG 10 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 9, 1993

Secretary
Federal Communications Commission
RE: MM Docket No. 93-158

Dear Sir:

Please accept these comments in the above captioned proceeding. I, Donald B. Brady, will submit an application for channel 265 CS at Utica, Mississippi and if granted a construction permit will immediately construct a new station. To the best of my knowledge and belief the information included in these comments are true and accurate. I certify this under penalty of perjury.

Sincerely,



Donald B. Brady
5880 Ridgewood Road
#D-40
Jackson, Mississippi 39211
601-957-1683

ATTACHMENT B

0412-70621 WAYBILL 7-90 SP2015				DELTA AIR LINES SPECIAL HANDLING AIR WAYBILL			
CONSIGNEE NAME 2/ Secretary / Federal Comm Comm		ACCOUNT # 006		Jy 0160 9845 DASH		EXECUTED AT/ BY DATE/TIME AUG 25 93	
STREET 1919 M. Street NW		TELEPHONE NO.(S)		DASH		AIR LINE	
CITY Washington DC		STATE DC				ZIP 20554	
RECEIVED IN GOOD ORDER EXCEPT AS NOTED				DELTA AIR LINES, INC.		FTO-4	
SIGNATURE		DATE		HARTSFIELD ATLANTA INTERNATIONAL AIRPORT		JACKSON, MISS	
PRINT NAME HERE		TIME		ATLANTA, GEORGIA 30320			
INSTRUCTIONS TO CARRIER 3/		ACCOUNT #		CARRIER DL	FLIGHT 228	DESTINATION DC	3RD CHARGE 1/29
TELEPHONE NO.(S)							2ND CHARGE
SHIPPER NAME Don Brady		DECLARE VALUE * SEE BACK \$		1/ DL	1094	Ar	1ST CHARGE
STREET 5820 Raleigh Rd.		RATE A		FINAL DESTINATION (SPELLED OUT) Washington		OTHER	
CITY Jan		PIECES 1		INTERLINE TAG #		TAX 305	
STATE 957-1633		WEIGHT PIECES		FORM OF PAYMENT (PREPAID ONLY)		CHECK SERVICE DESIRED	
SHIPPER'S SIGNATURE X Brady		RATE B		CASH/CK <input checked="" type="checkbox"/>		PICK UP <input type="checkbox"/> DELIVERY <input checked="" type="checkbox"/>	
PRINT NAME		51-70		C.R. CARD <input type="checkbox"/>		HOLD AT AIRPORT <input type="checkbox"/>	
SIGNATURE OF SHIPPER AND/OR INITIAL APPLICABLE BOX BELOW.		WEIGHT PIECES		CARGO BILLING <input type="checkbox"/>		FOR EXPEDITED PICK-UP AND DELIVERY SERVICE	
THIS SHIPMENT DOES NOT CONTAIN DANGEROUS GOODS REGULATED IN AIR TRANSPORT		TOTAL WEIGHT		GSL <input type="checkbox"/>		CALL TOLL FREE 800-638-7333	
THIS SHIPMENT DOES CONTAIN DANGEROUS GOODS REGULATED IN AIR TRANSPORT				PTA <input type="checkbox"/>		TOTAL 77.81	
CONTENTS Printed matter						DELIVER 24.75	

0160 3845

1. SHIPPER'S RECEIPT

Cmy/CXD

ATTACHMENT C

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete Items 1 and/or 2 for additional services.
- Complete Items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

- ☐ Addressee's Address
- ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Timothy K. Brady
P.O. Box 986
Brentwood, TN. 37027-0986

4a. Article Number

P223820346

4b. Service Type

☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery

8-27-95

5. Signature (Addressee)

6. Signature (Agent)

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1991 • U.S.G.P.O. 1992-307-530

DOMESTIC RETURN RECEIPT

Thank you for using Return Receipt Service.

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete Items 1 and/or 2 for additional services.
- Complete Items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

- ☐ Addressee's Address
- ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Timothy K. Brady
P.O. Box 986
Brentwood, TN. 37027-0986

4a. Article Number

P399005335

4b. Service Type

☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1991 • U.S.G.P.O. 1992-307-530

DOMESTIC RETURN RECEIPT

Thank you for using Return Receipt Service.

UNITED STATES POSTAL SERVICE

Official Business



PENALTY FOR PRIVATE
USE TO AVOID PAYMENT
OF POSTAGE, \$300



Print your name, address and ZIP Code here

Donald B. Brady
5880 Ridgewood Rd.
#D-40
Jackson, MS 39211

UNITED STATES POSTAL SERVICE

Official Business



PENALTY FOR PRIVATE
USE TO AVOID PAYMENT
OF POSTAGE, \$300



010000000000

Print your name, address and ZIP Code here

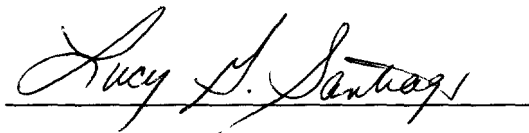
Donald B. Brady
5810 Ridgewood Rd.
#D-40
Jackson, MS 39211

CERTIFICATE OF SERVICE

The undersigned, an employee of Haley, Bader & Potts, hereby certifies that the foregoing document was mailed this date by First Class U.S. Mail, postage prepaid, to the following:

Timothy K. Brady, Esq.
7113 Peach Court
P.O. Box 986
Suite 208
Brentwood, TN 37024

James R. Cooke, Esq.
Harris, Beach & Wilcox
1816 Jefferson Place, NW
Washington, D.C. 20036

A handwritten signature in cursive script, reading "Lucy L. Santiago", is written over a horizontal line.

October 12, 1993